THE Legal Ethics & Malpractice Reporter

A monthly commentary on current ethical issues in law practice for members of the Kansas and Missouri Bars

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Contents

About This Publication

The Legal Ethics & Malpractice Reporter (LEMR, for short) is a free, monthly publication covering current developments in ethics and malpractice law—generally from the perspective of the Kansas and Missouri *Rules of Professional Conduct*. Founded in 2020, this publication was envisioned by KU Law professor Dr. Mike Hoeflich, who serves as its editor in chief. In partnership with Professor Hoeflich, JHC's legal ethics and malpractice group is pleased to publish this monthly online periodical to help attorneys better understand the evolving landscape of legal ethics, professional responsibility, and malpractice.

In addition to the digital format you're presently reading, we publish LEMR as mobile-friendly blog articles on our website. We also share a digest newsletter to our LEMR email subscribers whenever a new issue is published. (You may subscribe here if you aren't already a subscriber.)

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FEATURE ARTICLE

The U.S. Supreme Court's Confidentiality Breach

It seems that the Supreme Court is in the media more and more these days—and not only for its decisions. For the second time in just a few months, a draft opinion of the Court was leaked—this time onto the Court's own website. It does seem like an extraordinary coincidence that it has happened twice on the same subject: abortion. Indeed, there are few topics in current American society that are more controversial and about which people's passions run higher than that of abortion law. Many lawyers and court watchers suspect both leaks were deliberate. However, even if it one or both were inadvertent, one must ask what the ethical aspects of leaking Supreme Court documents should be.

A simple observation provokes two questions: Many of the Court personnel are lawyers. What if the origin of the leak is a licensed attorney (other than the Justices themselves)? What would be the ethical consequences of leaking these draft opinions?

If a licensed attorney intentionally made these leaks, this would surely constitute a breach of Rule 1.6 in any of its variants. In Kansas, the rule states:

> A lawyer shall not reveal information relating to representation of a client unless the client consents after consultation, except for disclosures that are impliedly authorized in order to carry out the representation, and except as stated in paragraph (b).

This basic rule is virtually the same in every jurisdiction. As 1.6(a) states, there are different exceptions, but it is hard to see that any would apply to leaking a Supreme Court draft brief. No jurisdiction permits the revelation of confidential information in service of political or religious beliefs.

The clerks and other attorney court employees could reasonably argue that the Justices and the Court are not clients, meaning the breach would not be subject to Rule 1.6. However, even if clerks are not subject to Rule 1.6, they are subject to the *Handbook of Ethics for Federal Judicial Clerks*, which states:

> It is always important to observe your judge's specific requirements

> about the confidentiality of your court work and chambers discussions. You should find out exactly how your judge wants you to
>
> - deal with the press, including
>   - restrictions on communications with the press
>   - procedures to follow when contacted by the press
>   - the availability of written guidelines for press inquiries
> - deal with counsel, including
>   - restrictions on communications with counsel
>   - procedures to follow when contacted by counsel
> - handle case-related discussions with court staff who do not work in your judge's chambers, including other law clerks.

While Rule 1.6 might not apply because there was no client, not all of the Rules of Professional Conduct require that a client be involved. Two other rules could apply. In Kansas, KRPC 8.4(b)–(d) states:

> It is professional misconduct for a lawyer to:
>
> (b) commit a criminal act that reflects adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects;
>
> (c) engage in conduct involving dishonesty, fraud, deceit or misrepresentation;
>
> (d) engage in conduct that is prejudicial to the administration of justice…

To the extent that deliberate and unauthorized taking, copying, and publicizing of a SCOTUS opinion is criminal, an attorney leaking such would be guilty of breaking Rule 8.4(b). To the extent that such an act involved dishonesty, fraud, deceit or misrepresentation—which seems likely—it would violate the prohibitions of Rule 8.4(c). Finally, it seems hard not to imagine that such an act would also significantly prejudice the "administration of justice" by the nation's highest court.

If an attorney working for the Court, whether as a staff member or a law clerk, inadvertently released a draft opinion, the analysis regarding Rule 1.6 would be the same. It seems quite possible that it would not be deemed a violation of the Rules. What changes, however, in the event of an inadvertent breach would be the applications of Rules 8.3(b)–(d) and their applicability. An inadvertent breach is

not likely to be a crime or evidence of dishonesty. It also seems unlikely that an inadvertent breach without intent to release documents would be deemed punishable under Rule 8.4(d). Similarly, an unintentional breach and release of a draft opinion would be subject to the rules for federal law clerks, but any such sanction would come from the justice for whom the clerk was working.

The investigation of the first leaked draft opinion several months ago still lacks resolution (at least as far as the public has been informed). Whether or not the leaker is found and revealed and whether or not the leak was deliberate, one must ask if the leaker(s) will suffer for the leak(s) professionally. My own sense is that, even if the leaks were intentional, it is unlikely that the leaker would be suspended or disbarred, if sanctioned at all. Furthermore, while many members of the bar might well dislike a deliberate leaker, there will be law firms that would welcome someone who leaked drafts of abortion opinions. Such are the workings of our divided country.

In many ways, the real question is, what ethical rules would a justice breach by releasing a draft opinion without the knowledge or agreement of his/her fellow justices? The justices are not subject to the Rules of Professional Responsibility of any jurisdiction or of rules adopted by lower federal courts. Instead, they are now "subject" to their own rules, which they recently adopted. The Code of Conduct the United States Supreme Court adopted on November 13, 2023 would almost certainly not punish a justice for leaking a draft opinion, although many justices would consider leaking a draft opinion a breach of decorum.

Presumably, the relevant section of the Code is Canon 3 and its text:

> CANON 3: A JUSTICE SHOULD PERFORM THE DUTIES OF OFFICE FAIRLY, IMPARTIALLY, AND DILIGENTLY.
>
> A. RESPONSIBILITIES. A Justice should not be swayed by partisan interests, public clamor, or fear of criticism. A Justice should participate in matters assigned, unless disqualified, and should maintain order and decorum in judicial proceedings. A Justice should be patient, dignified, respectful, and courteous to all individuals with whom the Justice deals in an official capacity. A Justice should not engage in behavior that is harassing, abusive, prejudiced, or biased. A Justice should not retaliate against those who report misconduct. A Justice should require similar conduct by

> those subject to the Justice's control. A Justice should take appropriate action upon receipt of reliable information indicating the likelihood of misconduct by a Court employee. Except as provided by law or Court rule, a Justice should not initiate, permit, or consider ex parte communications or consider other communications concerning a pending or impending matter that are made outside the presence of the parties or their lawyers. If a Justice receives an unauthorized ex parte communication bearing on the substance of the matter, the Justice should promptly notify the parties of the subject matter of the communication and allow the in conduct on the Justice's behalf or as the Justice's parties to respond. A Justice should not knowingly make public comment on the merits of a matter pending or impending in any court. The prohibition on public comment on the merits of a matter does not extend to public statements made in the course of the Justice's official duties. For scholarly, informational, or educational purposes, a Justice may describe the issues in a pending or impending case. A Justice should require similar restraint by Court personnel subject to the Justice's control. A Justice should not direct Court personnel to engage representative when that conduct would contravene the Canons if undertaken by the Justice.

This Canon states that a justice should not publicly comment on matters pending before the Court. One could argue that leaking a draft opinion runs contrary to that rule. However, because this Canon is aspirational rather than regulatory, there is neither a requirement to comply with nor a sanction for a justice who disregards it.

Finally, one must ask whether Congress might impeach a justice who releases a draft opinion. Impeaching any federal official is a grave matter. Impeaching a United States Supreme Court justice is even more serious and can create political repercussions that emanate far beyond the Court itself. This is why impeachment and conviction require that the impeached individual be guilty of "high crimes and misdemeanors." It seems highly unlikely that leaking a draft opinion would meet that threshold, even amid the highly partisan politics of 2024.

Leaking Court opinions prematurely is a serious breach of trust to the Court and to the American people. Violations of essential Court rules weaken the Court and make it look foolish and negligent. Under current rules and codes, however, it appears unlikely there will be any severe repercussions for such conduct—even if it was deliberate.

NEW AUTHORITY

Hunter Biden's Ethical Woes

The news recently has been full of Hunter Biden's legal troubles. A federal district court in Delaware has now convicted him of firearm charges. He has denied these charges, and his lawyer has stated quite clearly that he will appeal the convictions. Days after this guilty jury verdict, however, Hunter was "immediately suspended" from the practice of law by the District of Columbia Court of Appeals. Many lawyers outside the District of Columbia may wonder why such a rapid suspension of his D.C. law license followed his conviction in Delaware.

First, like most American jurisdictions, the District of Columbia courts and bar retain the right to act on criminal convictions and disciplinary sanctions other jurisdictions have imposed on a lawyer. Second, like other jurisdictions, the D.C. code of professional responsibility considers it a disciplinary violation when a lawyer is convicted of a crime. But the District of Columbia's *Code of Professional Responsibility* also specifies that the Court has an immediate responsibility to act when a member of the bar is convicted of a crime, even before a full disciplinary investigation and hearing has been conducted.

In the order suspending Hunter Biden, the D.C. Court of Appeals stated:

> On consideration of an accurate copy of the indictment and jury verdict form filed in the United States District Court for the District of Delaware demonstrating that the respondent was found guilty of three felony counts and it appearing that the offenses are "serious crimes" as defined by D.C. Bar Rule XI, § 10(b), it is
>
> ORDERED, pursuant to D.C. Bar Rule XI, § 10(c), that the respondent is suspended immediately from the practice of law in the District of Columbia pending resolution of this matter, and the Board on Professional Responsibility is directed to institute a formal proceeding to determine the nature of the offense and whether it involves moral turpitude within the meaning of D.C. Code § 11-2503(a)…
>
> FURTHER ORDERED that Disciplinary Counsel shall inform the court if the matter is resolved without the necessity of further court action.

As the order indicates, the key to the immediate suspension order resides in the text of D. C. Bar Rule XI Sec. 10:

> **Section 10. Disciplinary Proceedings Based Upon Conviction of Crime**
>
> *Notification.* If an attorney is found guilty of a crime or pleads guilty or *nolo contendere* to a criminal charge in a District of Columbia court, the clerk of that court shall, within ten days from the date of such finding or plea, transmit to this Court and to Disciplinary Counsel a certified copy of the court record or docket entry of the finding or plea. Disciplinary Counsel shall forward the certified copy to the Board. Upon learning that the certified copy has not been timely transmitted by the clerk of the court in which the finding or plea was made, or that an attorney has been found guilty of a crime or has pleaded guilty or *nolo contendere* to a criminal charge in a court outside the District of Columbia or in any federal court, Disciplinary Counsel shall promptly obtain a certified copy of the court record or docket entry of the finding or plea and transmit it to this Court and to the Board. The attorney shall also file with this Court and the Board, within ten days from the date of such finding or plea, a certified copy of the court record or docket entry of the finding or plea.
>
> *Serious crimes*. The term "serious crime" shall include (1) any felony, and (2) any other crime a necessary element of which, as determined by the statutory or common law definition of such crime, involves improper conduct as an attorney, interference with the administration of justice, false swearing, misrepresentation, fraud, willful failure to file income tax returns, deceit, bribery, extortion, misappropriation, theft, or an attempt or a conspiracy or solicitation of another to commit a "serious crime."
>
> *Action by the Court*—Serious crimes. Upon the filing with this Court of a certified copy of the record or docket entry demonstrating that an attorney has been found guilty of a serious crime or has pleaded guilty or *nolo contendere* to a charge of serious crime, the Court shall enter an order immediately suspending the attorney, notwithstanding the pendency of an appeal, if any, pending final disposition of a disciplinary proceeding to be commenced promptly

> by the Board. Upon good cause shown, the Court may set aside such order of suspension when it appears in the interest of justice to do so.
>
> *Action by the Board—Serious crimes*. Upon receipt of a certified copy of a court record demonstrating that an attorney has been found guilty of a serious crime or has pleaded guilty or *nolo contendere* to a charge of serious crime, or any crime that appears to be a serious crime as defined in subsection (b) of this section, Disciplinary Counsel shall initiate a formal proceeding in which the sole issue to be determined shall be the nature of the final discipline to be imposed. However, if the Court determines under subsection (c) of this section that the crime is not a serious crime, the proceeding shall go forward on any charges under the Rules of Professional Conduct that Disciplinary Counsel may institute. A disciplinary proceeding under this subsection may proceed through the Hearing Committee to the Board, and the Board may hold such hearings and receive such briefs and other documents as it deems appropriate.

Although having one's law license suspended immediately upon a criminal conviction despite the existence of any pending appeals may seem draconian, the rules that govern every member of the District of Columbia Bar require it.

ETHICS & MALPRACTICE RESEARCH TIP

New Articles from the *Current Index to Legal Periodicals*

1. Jon M. Garon, *Ethics 3.0-Attorney Responsibility in the Age of Generative Ai*, 79 Bus. Law. 209 (2024).

   Artificial Intelligence—particularly generative AI, i.e., machine learning or large language models (LMM)—continues to dominate legal ethical discussions. This is a useful contribution.

2. Eve Brensike Primus, *The Problematic Structure of Indigent Defense Delivery*, 122 Mich. L. Rev. 207 (2023).

   We cannot ignore indigent defense and its ethical implications. Here is a useful discussion.

A BLAST FROM THE PAST

A Cynical Take on the Legal Profession

> If there were no bad people,
>
> there would be no good lawyers.

—Charles Dickens, The Old Curiosity Shop 255 (1848).

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